9-5.000
ISSUES RELATED TO TRIALS AND OTHER COURT PROCEEDINGS

9-5.001 Policy Regarding Disclosure of Exculpatory and Impeachment Information

A. **Purpose.** Consistent with applicable federal statutes, rules, and case law, the policy set forth here is intended to promote regularity in disclosure practices, through the reasoned and guided exercise of prosecutorial judgment and discretion by attorneys for the government, with respect to the government's obligation both to disclose exculpatory and impeachment information to criminal defendants and to seek a just result in every case. The policy is intended to ensure timely disclosure of an appropriate scope of exculpatory and impeachment information so as to ensure that trials are fair. The policy, however, recognizes that other interests, such as witness security and national security, are also critically important, see USAM 9-21.000, and that if disclosure prior to trial might jeopardize these interests, disclosure may be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act). This policy is not a substitute for researching the legal issues that may arise in an individual case. Additionally, this policy does not alter or supersede the policy that requires prosecutors to disclose "substantial evidence that directly negates the guilt of a subject of the investigation" to the grand jury before seeking an indictment, see USAM 9-11.233.

B. **Constitutional obligation to ensure a fair trial and disclose material exculpatory and impeachment evidence.** Government disclosure of material exculpatory and impeachment evidence is part of the constitutional guarantee to a fair trial. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150, 154 (1972). The law requires the disclosure of exculpatory and impeachment evidence when such evidence is material to guilt or punishment. *Brady*, 373 U.S. at 87; *Giglio*, 405 U.S. at 154. Because they are Constitutional obligations, *Brady* and *Giglio* evidence must be disclosed regardless of whether the defendant makes a request for exculpatory or impeachment evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). Neither the Constitution nor this policy, however, creates a general discovery right for trial preparation or plea negotiations. *U.S. v. Ruiz*, 536 U.S. 622, 629 (2002); *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977).

   1. **Materiality and Admissibility.** Exculpatory and impeachment evidence is material to a finding of guilt—and thus the Constitution requires disclosure—when there is a reasonable probability that effective use of the evidence will result in an acquittal. *United States v. Bagley*, 475 U.S. 667, 676 (1985). Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.

   2. **The prosecution team.** It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant. *Kyles*, 514 U.S. at 437.

C. **Disclosure of exculpatory and impeachment information beyond that which is constitutionally and legally required.** Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or, as is often colloquially expressed, make the difference between guilt and innocence. As a result, this policy requires disclosure by prosecutors of information beyond that which is "material" to guilt as articulated in *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999). The policy recognizes, however, that a trial should not involve the consideration of information which is irrelevant or not significantly probative of the issues before the court and should not involve spurious issues or arguments which serve to divert the trial process from examining the genuine issues. Information that goes only to such matters does not advance the purpose of a trial and thus is not subject to disclosure.

   1. **Additional exculpatory information that must be disclosed.** A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime.

2. **Additional impeachment information that must be disclosed.** A prosecutor must disclose information that either casts a substantial doubt upon the accuracy of any evidence—including but not limited to witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence. This information must be disclosed regardless of whether it is likely to make the difference between conviction and acquittal of the defendant for a charged crime.

3. **Information.** Unlike the requirements of *Brady* and its progeny, which focus on evidence, the disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence.

4. **Cumulative impact of items of information.** While items of information viewed in isolation may not reasonably be seen as meeting the standards outlined in paragraphs 1 and 2 above, several items together can have such an effect. If this is the case, all such items must be disclosed.

D. **Timing of disclosure.** Due process requires that disclosure of exculpatory and impeachment evidence material to guilt or innocence be made in sufficient time to permit the defendant to make effective use of that information at trial. *See, e.g. Weatherford v. Bursey*, 429 U.S. 545, 559 (1997); *United States v. Farley*, 2 F.3d 645, 654 (6th Cir. 1993). In most cases, the disclosures required by the Constitution and this policy will be made in advance of trial.

1. **Exculpatory information.** Exculpatory information must be disclosed reasonably promptly after it is discovered. This policy recognizes that exculpatory information that includes classified or otherwise sensitive national security material may require certain protective measures that may cause disclosure to be delayed or restricted (*e.g.* pursuant to the Classified Information Procedures Act).

2. **Impeachment information.** Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently. In some cases, however, a prosecutor may have to balance the goals of early disclosure against other significant interests—such as witness security and national security—and may conclude that it is not appropriate to provide early disclosure. In such cases, required disclosures may be made at a time and in a manner consistent with the policy embodied in the Jencks Act, 18 U.S.C. § 3500.

3. **Exculpatory or impeachment information casting doubt upon sentencing factors.** Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation.

4. **Supervisory approval and notice to the defendant.** A prosecutor must obtain supervisory approval not to disclose impeachment information before trial or not to disclose exculpatory information reasonably promptly because of its classified nature. Upon such approval, notice must be provided to the defendant of the time and manner by which disclosure of the exculpatory or impeachment information will be made.

E. **Training.** All new federal prosecutors assigned to criminal matters and cases shall complete, within 12 months of employment, designated training through the Office of Legal Education on *Brady/Giglio*, and general disclosure obligations and policies. All federal prosecutors assigned to criminal matters and cases shall annually complete two hours of training on the government's disclosure obligations and policies. This annual training shall be provided by the Office of Legal Education or, alternatively, any United States Attorney's Office or DOJ component.

F. **Comment.** This policy establishes guidelines for the exercise of judgment and discretion by attorneys for the government in determining what information to disclose to a criminal defendant pursuant to the government's disclosure obligation as set out in *Brady v. Maryland* and *Giglio v. United States* and its obligation to seek justice in every case. This policy also establishes training requirements for federal prosecutors in this area. As the Supreme Court has explained, disclosure is constitutionally required when evidence in the possession of the prosecutor or prosecution team is material to guilt, innocence or punishment. Under this policy, the government's disclosure will exceed its constitutional obligations. Thus, this policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies. Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the Court. By doing so, prosecutors will ensure confidence in fair trials and verdicts. The United States Attorneys' Offices and Department components involved in criminal prosecutions are also encouraged to undertake periodic training for paralegals and to cooperate with and assist law enforcement agencies in providing education and training to agency personnel concerning the government's disclosure obligations and developments in relevant case law.

See also Criminal Resource Manual 165 ("Guidance for Prosecutors Regarding Criminal Discovery").

[updated June 2010] [cited in USAM 9-5.100; Criminal Resource Manual 165]

9-5.100

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

On December 9, 1996, the Attorney General issued a Policy regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy"). It applies to all Department of Justice Investigative agencies that are named in the Preface below. On October 19, 2006, the Attorney General amended this policy to conform to the Department's new policy regarding disclosure of exculpatory and impeachment information, see USAM 9-5.001. On July 11, 2014, the policy was revised in several respects, including with regard to the candid conversation between a prosecutor and an agency employee; the definition of impeachment information; record-keeping; information that must be provided to agencies; the transfer of Giglio-related information between prosecuting offices; and the notification of a prosecuting office of *Giglio* issues when an agency employee is transferred to a new district.

In early 1997, the Secretary of the Treasury issued the 1996 version of the *Giglio* Policy for all Treasury investigative agencies, and that policy remains in effect for Treasury investigative agencies.

Policy Regarding the Disclosure to Prosecutors of Potential Impeachment Information Concerning Law Enforcement Agency Witnesses ("Giglio Policy")

Preface: The following policy is established for: the Federal Bureau of Investigation, Drug Enforcement Administration, Bureau of Alcohol, Tobacco, Firearms and Explosives, the United States Marshals Service, the Department of Justice Office of the Inspector General, and the Department of Justice Office of Professional Responsibility ("the investigative agencies"). It addresses their disclosure of potential impeachment information to the United States Attorneys' Offices and Department of Justice litigating sections with authority to prosecute criminal cases ("Department of Justice prosecuting offices"). The purposes of this policy are to ensure that prosecutors receive sufficient information to meet their obligations under *Giglio v. United States*, 405 U.S. 150 (1972), and to ensure that trials are fair, while protecting the legitimate privacy rights of Government employees. NOTE: This policy is not intended to create or confer any rights, privileges, or benefits to prospective or actual witnesses or defendants. It is also not intended to have the force of law. *United States v. Caceres*, 440 U.S. 741 (1979).

The exact parameters of potential impeachment information are not easily determined. Potential impeachment information, however, has been generally defined as impeaching information which is material to the defense. *It also includes information that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—the prosecutor intends to rely on to prove an element of any crime charged, or might have a significant bearing on the admissibility of prosecution evidence.* [FN1] This information may include but is not strictly limited to: (a) specific instances of conduct of a witness for the purpose of attacking the witness' credibility or character for truthfulness; (b) evidence in the form of opinion or reputation as to a witness' character for truthfulness; (c) prior inconsistent statements; and (d) information that may be used to suggest that a witness is biased.

> FN1. The italicized language was added in 2006 when USAM 9-5.001 was issued. It broadens the definition of "potential impeachment information."

This policy is not intended to replace the obligation of individual agency employees to inform prosecuting attorneys with whom they work of potential impeachment information prior to providing a sworn statement or testimony in any investigation or case. In the majority of investigations and cases in which agency employees may be affiants or witnesses, it is expected that the prosecuting attorney will be able to obtain all potential impeachment information directly from agency witnesses during the normal course of investigations and/or preparation for hearings or trials.

This policy is intended to provide guidance to prosecuting offices and investigative agencies regarding what potential impeachment information must be produced to the prosecuting office. It does not address the issue of what information the prosecution must produce to the defense, or to the court for *ex parte, in camera review*. That determination can only be made after considering the potential impeachment information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, and after considering USAM 9-5.001, the January 4, 2010, Ogden Memo entitled "Guidance for Prosecutors Regarding Criminal Discovery," the Federal Rules of Evidence, case law, local court rulings and judicial predisposition, and other relevant guidance, policy, regulations and laws.

Procedures for Disclosing Potential Impeachment Information Relating to Department of Justice Employees

1. **Obligation to Disclose Potential Impeachment Information.** It is expected that a prosecutor generally will be able to obtain all potential impeachment information directly from potential agency witnesses and/or affiants. Prosecutors should have a candid conversation with each potential investigative agency witness and/or affiant with whom they work regarding any on-duty or off-duty potential impeachment information, including information that may be known to the public but that should not in fact be the basis for impeachment in a federal criminal court proceeding, so that prosecuting attorneys can take appropriate action, be it producing the material or taking steps to preclude its improper introduction into evidence. Likewise, each investigative agency employee is obligated to inform prosecutors with whom they work of potential impeachment information as early as possible prior to providing a sworn statement or testimony in any criminal investigation or case. Each investigative agency should ensure that its employees fulfill this obligation. Potential impeachment information that may relate directly to agency employee witnesses is defined more fully in paragraphs 5 and 6.

Because there are times when an agency employee will be unaware that he or she is the subject of a pending investigation, prosecutors will receive the most comprehensive potential impeachment information by having both the candid conversation with the agency employee and by submitting a request for potential impeachment information to the investigative agency. Therefore, in all cases, a prosecutor should carefully consider and is encouraged to request potential impeachment information from the investigative agency. This policy sets forth procedures for those cases in which a prosecutor decides to make such a request.

2. **Agency Officials.** Each of the investigative agencies shall designate an appropriate official(s) to serve as the point(s) of contact concerning Department of Justice employees' potential impeachment information ("the Agency Official"). Each Agency Official shall consult periodically with the relevant Requesting Officials about Supreme Court case law, circuit case law, and district court rulings and practice governing the definition and disclosure of impeachment information.

3. **Requesting Officials.** Each of the Department of Justice prosecuting offices shall designate one or more senior official(s) to serve as the point(s) of contact concerning potential impeachment information ("the Requesting Official"). Each Requesting Official shall inform the relevant Agency Officials about Supreme Court case law, circuit case law, and district court rulings and practice governing the definition and disclosure of impeachment information.

4. **Request to Agency Officials.** Upon initiation of a case or matter within the prosecuting office, or anytime thereafter, a prosecutor may request potential impeachment information relating to an agency employee associated with that case or matter. The prosecutor shall notify the appropriate Requesting Official, who may request potential impeachment information relating to the employee from the employing Agency Official(s) and the designated Agency Official(s) in the Department of Justice Office of the Inspector General ("DOJ-OIG") and the Department of Justice Office of Professional Responsibility ("DOJ-OPR").

5. **Disclosure of Potential Impeachment Information by Agency Employee and Agency**

(a) Agency Review and Disclosure. Upon receiving the request described in Paragraph 4, the Agency Official(s) from the employing agency, the DOJ-OIG, and the DOJ-OPR shall each conduct a review, in accordance with its respective agency plan, for potential impeachment information regarding the identified employee.

(b) Agency Employee. Before serving as an affiant or witness in any case or matter, the agency employee shall advise the prosecuting attorney(s) of the existence of any potential impeachment information. Potential impeachment information can include both on-duty and off-duty conduct. Prosecutors should be mindful that some potential impeachment information, including potential impeachment information stemming from off-duty conduct, may not be in agency files and may only be known to the agency employee.

(c) Potential Impeachment Information. Agency witnesses and Agency Officials should make broad disclosures of potential impeachment information to the prosecutor so that the prosecutor can assess the information in light of the role of the agency witness, the facts of the case, and known or anticipated defenses, among other variables. Potential impeachment information is defined in the Federal Rules of Evidence, case law, unpublished court rulings, and Department of Justice policy and guidance. Unless advised by a *Giglio* Requesting Official or prosecutor that case law or court rulings in the district require broader disclosures, potential impeachment information relating to agency employees may include, but is not limited to, the categories listed below:

i) any finding of misconduct that reflects upon the truthfulness or possible bias of the employee, including a finding of lack of candor during a criminal, civil, or administrative inquiry or proceeding;

ii) any past or pending criminal charge brought against the employee;

iii) any allegation of misconduct bearing upon truthfulness, bias, or integrity that is the subject of a pending investigation;

iv) prior findings by a judge that an agency employee has testified untruthfully, made a knowing false statement in writing, engaged in an unlawful search or seizure, illegally obtained a confession, or engaged in other misconduct;

v) any misconduct finding or pending misconduct allegation that either casts a substantial doubt upon the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any crime charged, or that might have a significant bearing on the admissibility of prosecution evidence. Accordingly, agencies and employees should disclose findings or allegations that relate to substantive violations concerning:

(1) failure to follow legal or agency requirements for the collection and handling of evidence, obtaining statements, recording communications, and obtaining consents to search or to record communications;

(2) failure to comply with agency procedures for supervising the activities of a cooperating person (C.I., C.S., CHS, etc.);

(3) failure to follow mandatory protocols with regard to the forensic analysis of evidence;

vi) information that may be used to suggest that the agency employee is biased for or against a defendant (*See United States v. Abel*, 469 U.S. 45, 52 (1984). The Supreme Court has stated, "[b]ias is a term used in the 'common law of evidence' to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest."); and

vii) information that reflects that the agency employee's ability to perceive and recall truth is impaired.

6. **Treatment of Allegations Which Are Unsubstantiated, Not Credible, or Have Resulted in Exoneration.** Allegations that cannot be substantiated, are not credible, or have resulted in the exoneration of an employee generally are not considered to be potential impeachment information. Upon request, such information which reflects upon the truthfulness or bias of the employee, to the extent maintained by the agency, will be provided to the prosecuting office under the following circumstances: (a) when the Requesting Official advises the Agency Official that it is required by a Court decision in the district where the investigation or case is being pursued; (b) when, on or after the effective date of this policy: (i) the allegation was made by a federal prosecutor, magistrate judge, or judge; or (ii) the allegation received publicity; (c) when the Requesting Official and the Agency Official agree that such disclosure is appropriate, based upon exceptional circumstances involving the nature of the case or the role of the agency witness; or (d) when disclosure is otherwise deemed appropriate by the agency. The agency is responsible for advising the prosecuting office, to the extent determined, whether any aforementioned allegation is unsubstantiated, not credible, or resulted in the employee's exoneration.

   Note. With regard to allegations disclosed to a prosecuting office under this paragraph, the *Giglio* Requesting Official shall ensure that special care is taken to protect the confidentiality of such information and the privacy interests and reputations of agency employee-witnesses, in accordance with paragraphs 7(b) and 12 below.

7. **Prosecuting Office Records**

   (a) Information in System of Records. For the purpose of ensuring that potential impeachment information is handled consistently within a prosecuting office, whenever potential impeachment information has been disclosed to the court or defense, or when a decision has been made that an agency employee should not testify or serve as an affiant because of potential impeachment information, Department of Justice prosecuting offices may retain the following types of information in a *Giglio* system of records that can be accessed by the identity of the disclosing agency's employee:

   i) the potential impeachment information;

   ii) any written analysis or substantive communications, including legal advice, relating to that disclosure or decision; and

   iii) any related pleadings or court orders.

   In all other circumstances, prosecuting offices may keep any written legal analysis and substantive communications integral to the analysis, including legal advice relating to the decision, and a summary of the potential impeachment information in the *Giglio* system of records. The complete description of the potential impeachment information received from the Agency Official may be maintained in the criminal case file, but it may not be maintained in the *Giglio* system of records.

   (b) Secure Records with Limited Access. *Giglio* Requesting Official(s) shall ensure that the information in their office's *Giglio* system of records is securely maintained and is accessible only upon a request to a *Giglio* Requesting Official or other senior management entrusted with this responsibility. The information shall only be disclosed to requesting prosecutors within that office on a case-related, need-to-know basis. It should be noted that much of the information in the *Giglio* system of records is sensitive information which if released or reviewed without a case-related need could negatively impact the privacy and reputation of the agency-employee to whom it relates, and could violate the Privacy Act.

   (c) Duty to Update. Before any prosecutor or *Giglio* Requesting Official uses or relies upon information included in the prosecuting office's *Giglio* system of records, the Requesting Official shall contact the relevant Agency Official(s) to determine the status of the potential impeachment information, the Agency Official(s) shall provide an update, and the Requesting Official shall update the prosecuting office's *Giglio* system of records to ensure that the information in the system of records is accurate.

8. **Information That Must Be Provided to Agencies.** When Agency Officials have provided potential impeachment information to a Requesting Official, the Requesting Official shall inform the employing Agency Official how the prosecuting office used the information. A circumstance may arise in which a prosecutor or Requesting Official learns of potential impeachment information relating to an agency employee from a source other than the agency—including but not limited to the agency employee. In such circumstance, the Requesting Official shall notify the Agency Official of such information and provide the Agency with a timely opportunity to meaningfully express its views regarding the information, as required by Paragraph12. Regardless of the source of the information, the Requesting Official will:

(a) advise the employing Agency Official whether the employee provided an affidavit or testimony in a criminal proceeding or whether a decision was made not to use the employee as a witness or affiant because of potential impeachment issues;

(b) advise the employing Agency Official whether the information was disclosed to a Court or to the defense and, if so, whether the Court ruled that the information was admissible for use as impeachment information; and

(c) provide the employing Agency Official a copy of any related pleadings, and any judicial rulings, findings or comments relating to the use of the potential impeachment information.

The agency shall maintain judicial rulings and related pleadings on information that was disclosed to the Court or the defense in a manner that allows expeditious access upon the request of any Requesting Official.

9. **Continuing Duty to Disclose.** Each agency plan shall include provisions which will assure that, once a request for potential impeachment information has been made, the prosecuting office will be made aware of any additional potential impeachment information that arises after such request and during the pendency of the specific criminal case or investigation in which the employee is a potential witness or affiant. A prosecuting office which has made a request for potential impeachment information shall promptly notify the relevant agency when the specific criminal case or investigation for which the request was made ends in a judgment or declination, at which time the agency's duty to disclose shall cease.

10. **Providing Records and Information to Another Federal Prosecuting Office and Disposition of Records**

(a) Distribution of Information to Another Federal Prosecuting Office with Notice to Agency Official(s). If an agency employee has been transferred to another judicial district, or will testify or serve as an affiant in another judicial district, the prosecuting office in the originating district may provide any relevant information from its *Giglio* system of records relating to that agency employee to a *Giglio* Requesting Official in the new district. Moreover, nothing shall prohibit the Requesting Official in the new district from consulting with the Requesting Official in the former district about the manner in which the former district handled certain potential impeachment information.

The *Giglio* Requesting Official(s) providing the information shall notify the Agency Official(s) when distributing materials from its *Giglio* system of records to another prosecuting office, unless the information relates to pending investigations or other incomplete matters, the status of which may have changed or been resolved favorably to the agency employee. With regard to pending investigations or other incomplete matters, to avoid the unnecessary disclosure of potentially derogatory information regarding an agency employee, the *Giglio* Requesting Official transferring the information shall notify the relevant Agency Official(s) before providing any information to another prosecuting office, except as noted in paragraph 13. The Agency Official(s) shall provide a prompt update. Whether notice is provided before or contemporaneously with the transfer, the *Giglio* Requesting Official shall also advise the Agency Official(s) what materials will be or have been distributed.

(b) Duty to Update. The Requesting Official in the new prosecuting office shall seek an update from Agency Official(s) as part of the *Giglio* analysis, and shall allow the agency the timely opportunity to fully express their views as required by Paragraph 12 and to provide an update. The Requesting Official in the new district is not bound by the former district's decisions regarding disclosure of information to the Court or defense, or use of the agency employee as a witness or affiant, and should review the former district's information along with other relevant information, when making an independent decision regarding disclosure to the Court or defense, use of the agency employee as a witness or affiant, and other related issues.

(c) Removal of Records Upon Transfer, Reassignment, or Retirement of Employee. Upon being notified that an agency employee has retired, been transferred to an office in another judicial district, or been reassigned to a position in which the employee will neither be an affiant nor witness, and subsequent to the resolution of any litigation pending in the prosecuting office in which the agency employee was involved, the Requesting Official shall remove from the prosecuting office's system of records any record that can be accessed by the identity of the employee. More specifically, the records must be removed at the conclusion of the direct and collateral appeals, if any, or within one year of the agency employee's retirement, transfer, or reassignment, whichever is later.

11. **Notification.** When an agency employee is transferred to a new district, the Agency shall ensure that a Requesting Official in the new district is advised of any potential impeachment material known to the Agency when the employee begins meaningful work on a case or matter within the prosecuting district or is reasonably anticipated to begin meaningful work on such a case or matter.

12. **Prosecuting Office Plans to Implement Policy.** Each prosecuting office shall develop a plan to implement this policy. The plan shall include provisions that require: (a) communication by the prosecuting office with the Agency Official about the disclosure of potential impeachment information to the Court or defense counsel, including indicating what materials are being distributed, and allowing for the Agency to promptly update the information and express its views on whether certain information should be disclosed to the Court or defense counsel; (b) preserving the security and confidentiality of potential impeachment information through proper storage and restricted access within a prosecuting office; (c) when appropriate, seeking an *ex parte, in camera* review and decision by the Court regarding whether potential impeachment

information must be disclosed to defense counsel; (d) when appropriate, seeking protective orders to limit the use and further dissemination of potential impeachment information by defense counsel; (e) allowing the relevant agencies the timely opportunity to fully express their views; and (f) information contained within the Giglio system of records may not be disclosed to persons outside of the Department of Justice except in a criminal case to which the United States is a party, and where otherwise authorized by law, regulation, or court order.

13. **Exception to Requirements Regarding Providing Notice to Agencies and Soliciting Agency Views.** In rare circumstances, a *Giglio* issue may arise immediately before or during a court proceeding, and a prosecuting office may determine that it does not have time to solicit the agency's views or provide notice before it must take action on the matter. In such a case, the prosecuting office shall provide notice or solicit agency views as promptly as the circumstances reasonably permit. Many situations of this type can be avoided by ensuring that prosecutors and agency employee witnesses have candid conversations and that prosecutors submit formal *Giglio* requests sufficiently in advance of any proceedings.

14. **Investigative Agency Plans to Implement Policy.** Each investigative agency shall develop a plan to effectuate this policy.

[updated July 2014] [cited in Criminal Resource Manual 165]

9-5.110 Testimony of FBI Laboratory Examiners

In situations where FBI laboratory examinations have resulted in findings having no apparent probative value, yet defense counsel intends to subpoena the examiner to testify, the United States Attorney (USA) should inform defense counsel of the FBI's policy requiring payment of the examiner's travel expenses by defense counsel. The USA should also attempt to secure a stipulation concerning this testimony. This will avoid needless expenditures of time and money attendant to the appearance of the examiner in court.

[updated December 2006]

9-5.150 Authorization to Close Judicial Proceedings to Members of the Press and Public

Procedures and standards regarding the closure of judicial proceedings to members of the press and public are set forth in 28 C.F.R. § 50.9. Government attorneys may not move for or consent to the closure of any criminal proceeding without the express prior authorization of the Deputy Attorney General.

There is a strong presumption against closing proceedings, and the Department foresees very few cases in which closure would be warranted. Only when a closed proceeding is plainly essential to the interests of justice should a Government attorney seek authorization from the Deputy Attorney General to move for or consent to closure of a judicial proceeding. Government attorneys should be mindful of the right of the public to attend judicial proceedings and the of the Department's obligation to the fair administration of justice.

Any request for authorization to move for or consent to closure, in addition to setting forth the relevant and procedural background, should include a detailed explanation of the need for closure, addressing each of the factors set forth in 28 C.F.R. § 50.9(c)(1)-(6). In particular, the request should address in detail how an open proceeding will create a substantial likelihood of danger to specified individuals; how ongoing investigations will be jeopardized; or how a person's right to a fair trial will be impaired. The request must also consider reasonable alternatives to closure, such as delaying the proceeding, if possible, until the reasons justifying closure cease to exist. The applicable form is in the Criminal Resource Manual at 161.

Whenever authorization to close a judicial proceeding is being sought pursuant to 28 C.F.R. § 50.9 in a case or matter under the supervision of the Criminal Division, the request should be directed to the Policy and Statutory Enforcement Unit, Office of Enforcement Operations. In cases or matters under the supervision of other divisions of the Department of Justice, the appropriate division should be contacted.

Because of the vital public interest in open judicial proceedings, every 60 days after termination of any proceeding closed pursuant to 28 C.F.R. § 50.9, Government attorneys must review the records of the proceedings to determine whether the reasons for closure still apply. As soon as the justification for closure ceases to exist, the Government must file an appropriate motion to have the records unsealed. See 28 C.F.R. § 50.9(f). While the Criminal Division monitors compliance with this requirement, it is the affirmative obligation of the U.S. Attorney's Offices to ensure that sealed records are reviewed in accordance with the regulation's requirements. U.S. Attorney's Offices should acknowledge this obligation in any request for authorization to move for or consent to closure.

[updated October 2008]